

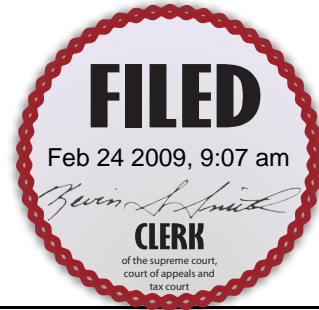
Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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**IN THE
COURT OF APPEALS OF INDIANA**

MICHAEL D. BAKER,
Appellant-Defendant,

VS.

JERRY LEHMAN,
Appellee-Plaintiff.

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No. 02A05-0810-CV-589

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Jerry Ummel, Magistrate
Cause No. 02D01-0804-SC-6180

February 24, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Michael D. Baker appeals the denial of the motion to correct error he filed following a small claims judgment in favor of Jerry Lehman. We reverse.

In its verified statement of evidence, the trial court found the following facts, which the parties do not dispute:

1. [Lehman] and [Baker] were both formerly associated with Reserve National Insurance Company [“RNIC”].
2. [Lehman] is a Manager of [RNIC] and has a Manager’s Contract with RNIC].
3. Lehman is an employee who is paid a basic salary and also receives commissions from insurance sold by agents working under him.
4. The Manager’s Contract contains the following provisions:

The Company may offset against any compensation, bonus, prize, commission, or override, initial or renewal, due Manager, his heirs, executors, administrators or assignees hereunder, any amounts which may become due to Company from Manager, including debit balances of salesmen working under Manager, which Manager is called upon to pay, and these amounts shall be a first lien against said compensation, bonus, prize, commission or override, initial or renewal, due Manager under this Agreement....

5. [Baker] was formerly an independent contractor of [RNIC] and worked under Lehman.
6. Prior to the lawsuit, Baker was unaware of the specifics of any agreement between Lehman and [RNIC] nor were the particulars of any agreement any of his concern. Baker was unaware that Lehman was or could be personally liable for any policy lapses or cancellations.
7. Baker entered into an Accident and Health Insurance Salesperson’s Independent Contractor Agreement with [RNIC] dated February 15, 2007 (“Accident and Health Insurance Agreement”)....

8. Baker entered into a Life Insurance Salesperson's Independent Contractor Agreement with [RNIC] dated February 15, 2007 ("Life Insurance Agreement")....
9. The Accident and Health Insurance Agreement contained the following pertinent provisions:
 10. The Salesperson shall maintain a minimum current credit balance with the Company to assure appropriate refunds and charges. Said minimum credit balance shall be accumulated by the Company's withholding ten percent (10%) of the gross premium submitted by the Salesperson, together with any renewal commissions which may be payable hereunder until said minimum credit balance is attained. At the end of the fourth (4th) full month from the date hereof, the Company will pay to the Salesperson twenty-five percent (25%) of any credit balance in said account in excess of One Thousand Dollars (\$1,000.00). At the end of the fifth (5th) full month, the Company will pay the Salesperson fifty percent (50%) of any credit balance in said account in excess of One Thousand Dollars (\$1,000.00) and at the end of the sixth (6th) full month, the Company will pay to the Salesperson one hundred percent (100%) of any credit balance in said account in excess of One Thousand Dollars (\$1,000.00). The Company shall thereafter maintain a minimum current credit balance, without interest, of One Thousand Dollars (\$1,000.00). Upon termination of this Agreement, the Company shall be entitled to retain such credit balance for a period of ninety (90) days to cover refunds and charges occurring after such termination.
 11. The Company may offset against any compensation, bonus, prize or commission due the Salesperson, his/her heirs, executors, administrators or assigns hereunder, any amounts which become due to the Company from the Salesperson, including commissions on premiums returned for any reason to insureds; and these amounts shall be a first lien against said compensation, bonus, prize or commission due the Salesperson under this Agreement. Any amounts due the Company from the Salesperson shall bear interest at the rate of 10% per annum if not paid within thirty (30) days from the date a statement is furnished to the Salesperson reflecting such indebtedness. The Company shall be entitled to add to the Salesperson's account

any expenses which it incurs as a result thereof, and if suit is brought to recover on such account, the Company shall be entitled to collect a reasonable attorney's fee together with all the costs and expenses incident to said action.

10. There were no other signatories to the Accident and Health Insurance Agreement or the Life Insurance Agreement other than [RNIC] by Kemp J. Cole, Vice President, and Baker.
11. Baker never entered into a contract or any agreement with Jerry Lehman. Baker has never entered into any agreement, contract or understanding with Jerry Lehman and was unaware of any obligation of Jerry Lehman to [RNIC].
12. After February 15, 2007, Baker began to sell insurance policies for [RNIC]. Ten percent of his gross premiums were withheld pursuant to his agreements with [RNIC] and have not been returned to him.
13. Baker's relationship with [RNIC] ended.
14. Some of the policies sold by Baker on behalf of [RNIC] were cancelled and/or premiums were refunded to the policyholder.
15. The policies affected were all accident and health insurance policies.
16. Baker's Agent's Statement shows the commissions related to policies that were cancelled....
17. [RNIC] deducted the amount of commissions stated on the Agent's Statement, in the amount of \$4,322.26, from Lehman's compensation.
18. Lehman filed suit against Baker to recover the amounts that were deducted from his compensation.
19. Pursuant to the Agent Agreement between [Baker] and the Company, a portion of the commissions earned by [Baker] was retained in [Baker's] Agent Account to assure that the Company could recover any commissions paid to [Baker] on policies that were later terminated or cancelled before issue, and which require the Company to issue a refund to the policy holder (i.e. "charge backs").

20. [Baker] became indebted to [RNIC] after his Agent Agreement was terminated as a result of charge backs that exceeded the amount remaining in [Baker's] Agent Account.
21. [Baker] has not made any attempt to remit payment to [RNIC].

Appellant's App. at 12-14 (citations to exhibits omitted).

As indicated above, Lehman filed suit against Baker in small claims court, and the case went to trial. On June 17, 2008, the court issued a judgment in favor of Lehman that contains the following findings:

1. Both parties were employed by [RNIC]. [Lehman] is an employee who is paid a basic salary and also receives commissions from insurance sold by agents working under him.
2. [Baker] was an independent contractor of [RNIC] working under [Lehman].
3. When [Baker] would sell an insurance policy requiring periodic payments he would be paid his full commission for the entire term of the policy. If the policy was cancelled or payments were not received he would then have a duty to repay the company for any unearned commission.
4. [Lehman's] contract with the [RNIC] stated that if an agent working under him did not repay the company for any unearned commissions the company could deduct those amounts from the compensation due [Lehman].
5. [Baker] terminated his employment with [RNIC] and some of the policies he had sold were cancelled. Although [RNIC] had the right to attempt to recover the amounts due from [Baker] they chose to simply deduct the amounts from the compensation of [Lehman]. The total amount to be deducted is the sum of \$4,322.26.
6. [Lehman] filed this lawsuit to recover the amount being deducted from his compensation.

7. [Baker] argued that [Lehman] had no contractual right to sue [Baker] and this Court agrees.
8. However, [Lehman] basically became a guarantor of payment due from [Baker] to [RNIC]. Under Indiana Law if a guarantor is forced to satisfy the debt of another a cause of action arises against the underlying debtor. This Court finds that [Lehman] does have a right to pursue payment from [Baker]. [Baker] did not contest the amount due and owing.

Judgment for [Lehman] against [Baker] in the sum of \$4,322.26. Costs to [Baker].

Id. at 6-7.

Baker filed a motion to correct error, which the trial court denied on September 8, 2008. That same day, the trial court issued an amended judgment with the following finding:

8. [Lehman] became an equitable guarantor of payment due from [Baker] to [RNIC] under the contract between [RNIC] and [Lehman]. [Baker] did not contest the amount due and owing to [RNIC].

Id. at 10-11. This appeal ensued.

In *Lae v. Householder*, 789 N.E.2d 481 (Ind. 2003), our supreme court explained,

Under Trial Rule 52(A), the standard of appellate review for facts determined in a bench trial is clearly erroneous, and due regard is given to the opportunity of the trial court to judge the credibility of the witnesses. Judgments from small claims court are “subject to review as prescribed by relevant Indiana rules and statutes.” Ind. Small Claims Rule 11(A). A “deferential standard of review is particularly important in small claims actions, where trials are ‘informal, with the sole objective of dispensing speedy justice between the parties according to the rules of substantive law.’” *City of Dunkirk Water & Sewage Dep’t v. Hall*, 657 N.E.2d 115, 116 (Ind. 1995) (quoting Ind. Small Claims Rule 8(a)). This doctrine relates to procedural and evidentiary issues, but does not apply to the substantive rules of law which are reviewed de novo as in an appeal from a court of general jurisdiction.

Id. at 483. Here, we are concerned with the trial court’s application of law to undisputed facts, and thus we conduct a de novo review. *Gibson-Lewis, LLC v. Teachers Credit Union*, 854 N.E.2d 392, 394 (Ind. Ct. App. 2006), *trans. denied* (2007). “We will affirm a general judgment entered with findings if it can be sustained on any legal theory supported by the evidence.” *Collections, Inc. v. Wolfe*, 818 N.E.2d 14, 16 (Ind. Ct. App. 2004).

Baker contends, and we agree, that the trial court’s judgment in favor of Lehman cannot be sustained on the basis that Lehman was an “equitable guarantor.”¹ Initially, Baker points out that the term “equitable guarantor” is unknown in Indiana law. He further observes that, in any event, ““equity follows the law”” and that ““an equitable right cannot be founded on a violation of law.”” Appellant’s Br. at 15 (quoting *Hopper Res., Inc. v. Webster*, 878 N.E.2d 418, 422 (Ind. Ct. App. 2007) (citation omitted), *trans. denied* (2008)).

“A guaranty is a contract to assume liability for the debts of another upon default. When the person or entity primarily liable for the debt defaults, the guarantor becomes the debtor. The guaranty is the evidence of the debt.” *Pollas v. Hardware Wholesalers, Inc.*, 663 N.E.2d 1188, 1190 (Ind. Ct. App. 1996) (citations omitted). To be enforceable, a contract to assume liability for another’s debts must be in writing and signed by the primary

¹ Lehman failed to respond to Baker’s argument in his appellee’s brief. We have stated that

[a]n appellee’s failure to respond to an issue raised by an appellant is akin to failure to file a brief. This circumstance does not, however, relieve us of our obligation to decide the law as applied to the facts in the record in order to determine whether reversal is required. Controverting arguments advanced for reversal is still an obligation which properly remains with counsel for the appellee.

Newman v. State, 719 N.E.2d 832, 838 (Ind. Ct. App. 1999) (citations omitted), *trans. denied* (2000).

debtor. *See* Ind. Code § 32-21-1-1(b)(2) (statute of frauds). Even assuming for argument's sake that Baker was indebted to RNIC for commissions related to cancelled policies,² the fact remains that Lehman did not contract with Baker—either in writing or otherwise—to assume liability for such debt. To the extent the trial court premised Baker's liability on Lehman's contract with RNIC, which authorized the latter to deduct Baker's commissions from the former's compensation, we note that Baker was not a party to (and in fact was unaware of the existence of) that contract. In short, the trial court's conclusion that Lehman is entitled to recovery as Baker's guarantor, whether equitable or legal, is clearly erroneous.

In his appellee's brief, Lehman contends that he is entitled to recovery under the equitable subrogation doctrine.

Equitable subrogation is applicable when a party, not acting as a mere volunteer, pays the debt of another which, in good conscience, should have been paid by the one primarily liable. At that time, if equity permits, the party who has paid the creditor, or subrogee, becomes entitled to the legal rights and security originally held by the creditor. Subrogation depends upon the equities and attending facts and circumstances of each case.

Osterman v. Baber, 714 N.E.2d 735, 737 (Ind. Ct. App. 1999) (citations, brackets, and quotation marks omitted), *trans. denied*. Lehman contends that Baker owed a debt to RNIC that he refused to pay and that because Lehman was contractually obligated to pay that debt, he did not act as a mere volunteer in doing so.

We agree with Baker that even if he was indebted to RNIC for the commissions on the cancelled policies, the fact that Lehman was also liable renders equitable subrogation

² Baker asserts that he “is not liable to [RNIC] for the amounts due because he did not contract to be liable nor did [RNIC] make that a requirement of” his contract. Appellant's Br. at 14.

inapplicable here. *See Konger v. Schillace*, 875 N.E.2d 343, 350 n.7 (Ind. Ct. App. 2007) (stating that equitable subrogation did not apply where husband and wife were jointly and severally liable for debt). We are unaware of any other theory under which Lehman is entitled to recover from Baker. Consequently, we reverse the trial court's judgment in Lehman's favor.

Reversed.

ROBB, J., and BROWN, J., concur.